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11 *Attorney for Plaintiffs-Appellees* JEFFREY AND JENIFER SCHULKEN

12
13 **UNITED STATES DISTRICT COURT**
14 **NORTHERN DISTRICT OF CALIFORNIA**
15 **SAN JOSE DIVISION**

16 JEFFREY SCHULKEN AND JENIFER
17 SCHULKEN, individually and on behalf of a
class of similarly situated individuals,

18 Plaintiffs-Appellees,

19 v.

20 WASHINGTON MUTUAL BANK and
21 JPMORGAN CHASE BANK, N.A.

22 Defendants.
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Case No. 5:09-cv-2708-LHK

[Hon. Lucy H. Koh]

**PLAINTIFFS' MOTION FOR
CONTEMPT AGAINST OBJECTOR
DONALD R. EARL**

Date: October 16, 2014

Time: 1:30 P.M.

Location: Courtroom 8, 4th Floor

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE THAT on Thursday, October 16, 2014 at 1:30 p.m., or as soon as thereafter as this matter may be heard, Plaintiffs Jeffrey Schulken and Jenifer Schulken will appear, through counsel, before the Honorable Lucy H. Koh, or any judge sitting in her stead, in Courtroom 8 of the United States District Court for the Northern District of California, San Jose Division, located at the United States Courthouse, 280 South 1st Street, San Jose, California 95113, and move this Court for an Order holding Objector Donald R. Earl in contempt for his failure to post an appeal bond as ordered. This motion is based upon this Notice of Motion, Plaintiffs' memorandum of points and authorities in support thereof, and the record in this case, along with any oral argument that may be presented to the Court and any evidence submitted in connection therewith.

Dated: June 27, 2014

Respectfully Submitted,

JEFFREY SCHULKEN AND JENIFER
SCHULKEN, individually and on behalf of a
class of similarly situated individuals,

By: s/ Steven L. Woodrow
One of Plaintiffs' Attorneys

1 **I. INTRODUCTION**

2 Objector-Appellant Donald R. Earl has willfully failed to comply with an order of this
 3 Court. As such, Plaintiffs Jeffrey Schulken, Jenifer Schulken, and the Settlement Class
 4 (collectively, “Plaintiffs”) respectfully move this Court for an order holding the Objector in
 5 contempt. Specifically, on April 2, 2013, this Court ordered Mr. Earl to post an appeal bond in
 6 accordance with Federal Rule of Civil Procedure 7 in the amount of \$5,000. (Dkt. 259.) To date,
 7 Mr. Earl has not posted the appeal bond. Consequently, Plaintiffs respectfully request that this
 8 Court (1) find Mr. Earl in contempt, and (2) fine Mr. Earl until he complies with this Court’s
 9 order.

10 **II. BACKGROUND**

11 On November 13, 2013, this Court granted final approval to a class action settlement
 12 between Plaintiffs and Defendants Washington Mutual Bank and J.P. Morgan Chase Bank N.A.,
 13 overruling the misplaced objections to the fairness of the Settlement made by its lone objector—
 14 Donald Earl. (Dkt. 223.) Mr. Earl filed a motion to vacate the order granting final approval to the
 15 class action settlement (Dkt. 225), and on January 1, 2013, this Court entered an order denying
 16 Mr. Earl’s motion to vacate (Dkt. 237.) Dissatisfied, Mr. Earl filed a notice of appeal appealing
 17 four of this Court’s orders to the Ninth Circuit: (1) the order granting in part and denying in part
 18 class certification (Dkt. 184), (2) the order granting preliminary approval to the Parties’ class
 19 action settlement (Dkt. 210), (3) the order granting final approval to the settlement (Dkt. 223), and
 20 (4) the order denying Earl’s motion to vacate the judgment (Dkt. 37).

21 Because Plaintiffs and the class have incurred taxable costs during the pendency of the
 22 appeal—including for such things as preparation and transmission of the record and the fee for
 23 filing the notice of appeal—this Court granted Plaintiffs’ request for an appeal bond. (Dkt. 259.)
 24 Specifically, this Court entered an order on April 2, 2013 stating as follows: “**The Court hereby**
 25 **ORDERS Mr. Earl to post a bond pursuant to Rule 7 of \$5,000.**” (Dkt. 259 at 10) (the “Appeal
 26 Bond Order”) (emphasis added). To date, and in flagrant violation of this Court’s Appeal Bond
 27 Order, Mr. Earl has refused to post any appeal bond.

1 III. ARGUMENT

2 This Court “has the inherent authority to enforce compliance with its orders through a civil
3 contempt proceeding.” *Armstrong v. Brown*, 939 F. Supp. 2d 1012, 1018 (N.D. Cal. 2013) (citing
4 *Int’l Union, UMWA v. Bagwell*, 512 U.S. 821, 827 – 28 (1994)); *see also United States v. Powers*,
5 629 F.2d 619, 624 (9th Cir. 1980) (“The inherent power of the courts . . . to coerce compliance
6 with orders is not disputed.”). Objector Earl’s failure to comply with the Appeal Bond Order is
7 contempt, which this Court should not hesitate to use its inherent authority to remedy.¹

8 A. Objector Earl’s failure to comply with the Appeal Bond Order is contempt.

9 To prevail on this motion for civil contempt, Plaintiffs must show that Mr. Earl “violated
10 the [Appeal Bond Order] beyond substantial compliance, and that the violation was not based on a
11 good faith and reasonable interpretation of the [order].” *Wolfard Glassblowing Co. v. Vanbragt*,
12 118 F.3d 1320, 1322 (9th Cir. 1997). Here, Mr. Earl’s violation of the Appeal Bond Order is
13 indisputable. This Court ordered Mr. Earl to post an appeal bond in the amount of \$5,000. (Dkt.
14 259 at 10.) More than a year has passed and Mr. Earl still has not posted bond in the amount of
15 \$5,000. Nor has Mr. Earl taken any action that could even arguably be considered substantial
16 compliance with the Appeal Bond Order because there has been *no compliance whatsoever*.

17 Earl’s failure to comply with the Appeal Bond Order cannot be based on a good faith and
18 reasonable interpretation of the order. The Appeal Bond Order is simple and straightforward, and
19 there is no reasonable interpretation of the order with which Mr. Earl’s failure to post an appeal
20 bond is consistent. Mr. Earl previously claimed that he was not in violation of the Appeal Bond
21 Order—despite his failure at that time to post bond more than three months after the Appeal Bond
22 Order—because the order does not establish a deadline by which Mr. Earl must post his appeal
23 bond. (Appeal Dkt. 19 at 15.) However, the law is clear: “Absent a stay, ‘all orders and judgments
24 of courts must be complied with promptly.’” *Donovan v. Mazzola*, 716 F.2d 1226, 1240 (9th Cir.
25 1983) (quoting *Maness v. Meyers*, 419 U.S. 449, 458 (1975)). Even if a party moves to stay an

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27 ¹ Plaintiffs’ motion invokes only this Court’s *civil* contempt power. *See, generally, Int’l*
28 *Union, UMWA v. Bagwell*, 512 U.S. 821, 826 – 30 (1994) (distinguishing civil and criminal
contempt).

1 order, such as the Appeal Bond Order here, it must be complied with until stayed or reversed. *See*
 2 *United States v. UMW*, 330 U.S. 258, 293 (1947) (“[W]e find impressive authority for the
 3 proposition that an order issued by a court with jurisdiction over the subject matter and person
 4 must be obeyed by the parties until it is reversed by orderly and proper proceedings.”); *Maness*,
 5 419 U.S. at 458 (“If a person to whom a court directs an order believes that order is incorrect the
 6 remedy is to appeal, but, absent a stay, he must comply promptly with the order pending appeal.”).
 7 Mr. Earl may not simply ignore this Court’s order because he thinks the Court is wrong.²

8 Because Earl has failed to comply with this Court’s clear order requiring him to post an
 9 appeal bond, this Court should find Mr. Earl in contempt. *See, e.g., In re Magsafe Apple Power*
 10 *Adapter Litig.*, No. C 09-01911 JW, 2012 WL 3686783, *1 – 2 (N.D. Cal. Aug. 22, 2012) (rev’d
 11 in part on other grounds) (holding objector to class action settlement in contempt for failing to
 12 comply with order requiring him either to post a \$15,000 bond or dismiss his appeal); *Embry v.*
 13 *ACER Am. Corp.*, No. C 09-01808 JW, 2012 WL 3777163, *2 (N.D. Cal. Aug. 29, 2012) (holding
 14 objector to class action settlement in contempt for failing to comply with order requiring him
 15 either to post a \$70,000 bond or dismiss his appeal); *Donovan*, 716 F.3d at 1239 – 40 (finding
 16 district court did not abuse its discretion in holding in contempt appellants who failed to comply
 17 with district court’s order requiring payment of bond).

18 **B. Mr. Earl should be fined until he complies with the Appeal Bond Order.**

19 To remedy Mr. Earl’s contempt, this Court should fine Mr. Earl on a daily basis until he
 20 complies with the Appeal Bond Order. The purpose of civil contempt proceedings is to coerce
 21 compliance with a court order. *Ahearn ex rel. NLRB v. Int’l Longshore & Warehouse Union*,
 22 *Locals 21 & 4*, 721 F.3d 1122, 1128 (9th Cir. 2013). Two common methods of coercing
 23 compliance are daily fines and confinement until the contemnor complies with the order. *See Int’l*
 24 *Union, UMW v. Bagwell*, 512 U.S. 821, 828 (1994) (“The paradigmatic coercive, civil contempt

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 26 ² Mr. Earl’s claim that the Court left it to his discretion as to *when* to comply with the
 27 Appeal Bond Order is nonsensical and belied by the “urgent” motion that Mr. Earl filed shortly
 28 after the Appeal Bond Order issued, asking the Ninth Circuit to stay the Appeal Bond Order. (*See*
 Appeal Dkt. 8.) Absent his actual belief that prompt compliance with the Appeal Bond Order was
 indeed necessary, there would have been no reason for Mr. Earl to file an “urgent” motion to stay.
 Notably, the Ninth Circuit denied Mr. Earl’s supposedly “urgent” Motion to Stay.

1 sanction . . . involves confining a contemnor indefinitely until he complies with an affirmative
 2 command”); *id.* at 829 (“A close analogy to coercive imprisonment is a per diem fine
 3 imposed for each day a contemnor fails to comply with an affirmative court order.”).

4 Here, the purpose of the Appeal Bond Order was to protect Plaintiffs from nonpayment of
 5 costs to which they would be entitled if Mr. Earl’s appeals were unsuccessful—which this Court
 6 found was likely. (Dkt. 259 at 8.) The Ninth Circuit recently held that monetary sanctions were
 7 appropriate in response to nearly identical contempt, and this Court should follow the Ninth
 8 Circuit’s direction. *See In re Magsafe Apple Power Adapter Litig.*, No. 12-15757, 2014 WL
 9 1624493, at *1 (9th Cir. Apr. 24, 2014) (finding that although the district court lacked authority to
 10 remove the basis for appellant’s appeal as a sanction for his failure to post the bond, the district
 11 court could “exercise its discretion to impose any appropriate sanction for violations of its [appeal
 12 bond order]”). Mr. Earl should not be permitted to flout the Appeal Bond Order and should
 13 therefore be required to pay a daily fine until he complies with the Appeal Bond Order by posting
 14 the bond.

15 Alternatively, this Court should consider holding Mr. Earl in custody until he complies
 16 with the Appeal Bond Order. While Plaintiffs believe the most effective way to remedy Mr. Earl’s
 17 contempt would simply be to impose fines, this Court, if it so desires, could instead hold Mr. Earl
 18 in custody until he complies with the Appeal Bond Order.³

19 **IV. CONCLUSION**

20 For the reasons discussed above, Plaintiffs respectfully request that this Court (1) find Mr.
 21 Earl in contempt; (2) fine Mr. Earl or hold him in custody until he comply with this Court’s order;
 22 and (3) award such other and further relief as the Court deems equitable and just.

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 27 ³ While some courts have gone so far as to imprison parties in order to coerce compliance
 28 with their orders, *see, e.g., SEC v. Yun*, 208 F. Supp. 2d 1279, 1288 (S.D. Fla.) (ordering
 imprisonment until contemnor complied with court order to post supersedeas bond), Plaintiffs do
 not request such relief at this time.

1 Dated: June 27, 2014

Respectfully Submitted,

2 JEFFREY SCHULKEN AND JENIFER
3 SCHULKEN, individually and on behalf of a
4 class of similarly situated individuals,

5 By: s/ Steven L. Woodrow _____
6 One of Plaintiffs' Attorneys

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20 * Admitted *Pro Hac Vice*

21 *Attorney for Plaintiffs-Appellees* JEFFREY AND JENIFER SCHULKEN
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CERTIFICATE OF SERVICE

I hereby certify that on June 27, 2014, I caused Plaintiffs' Motion for Contempt Against Objector Donald R. Earl to be electronically filed with the Clerk of the court using the CM/ECF system, which will send notification of filing to counsel of record for each party. I further certify that on June 27, 2014, I caused the aforementioned document to be sent to the following person via electronic mail and U.S. mail at the address indicated below:

Donald R. Earl
3090 Discovery Rd.
Port Townsend, WA 98368
don-earl@waypoint.com

Dated: June 27, 2014

By: s/ Steven L. Woodrow
Steven L. Woodrow